

LAW ENFORCEMENT LEGAL UPDATE OUTLINE

ARREST, SEARCH & SEIZURE, AND SELECTED OTHER TOPICAL AREAS WITH COMMENTS ON CIVIL LIABILITY RAMIFICATIONS

I. ARREST, STOP AND FRISK

A. The Seizure Continuum-- "Contact" v. "Terry Seizure" v. "Arrest"

1. *When does a "contact" become a "seizure"?*

State v. Soto-Garcia, 68 Wn. App. 20 (Div. II, 1992), March '93 LED:09 (Request for ID + q's about drugs + request for consent to search = seizure)

State v. Thorn, 129 Wn.2d 347 (1996) Aug. '96 LED:13 (No seizure for uniformed officer to approach parked car and ask: "where's the pipe?"; State Supreme Court accepts U.S. Supreme Court's alternative tests of "free to decline" or "free to leave" and rejects defendant's exclusive "free to leave" approach)

U.S. v. Drayton, 122 S.Ct. 2105 (2002) Sept. '02 LED:02 (U.S. Supreme Court held under 4th Amendment that no seizure occurred in random bus sweep operation in which Florida officers asked Greyhound bus riders: 1) if they were carrying drugs, and 2) if they would consent to search; also, consents were held to be voluntary even though riders were not advised of right to refuse consent. BEWARE: Washington appellate courts are likely to be more restrictive in ruling on "bus sweep" issues of "seizure" and/or "consent" under article 1, section 7 of Washington Constitution)

State v. Elwood, 52 Wn. App. 70 (Div. I, 1988) Nov. '88 LED:05 (Telling FIR contact to "wait right here" -- or taking ID and walking away -- while checking for warrants is a seizure)

State v. Hansen, 99 Wn. App. 575 (Div. I, 2000) June '00 LED: 17 (Requesting ID, handing it to fellow officer who recorded information and handed it back to citizen within 30 seconds, radioing

information, and then conversing with citizen in non-coercive manner, was not "seizure" under totality of the facts)

State v. Crane, 105 Wn. App. 301 (Div. II, 2001) June '01 LED:08 (Requesting ID and holding it for several minutes, while standing with subject, and checking by hand-held radio for outstanding warrants was "seizure" under totality of facts, and the seizure was not justified by the mere fact that the person had been observed approaching a residence for which police were in the process of obtaining a search warrant)

State v. O'Neill, 148 Wn.2d 564 (2003) April '03 LED:03 (Washington Supreme Court holds that no seizure occurred where officer spotlighted a car parked in a market parking lot, then followed up by asking the person in the driver's seat about his presence there and by asking him for ID)

State v. Stroud, 30 Wn. App. 392 (Div. II, 1981) Feb. '82 LED:05 (Turning on overhead flashers is a seizure)

State v. Young, 135 Wn.2d 498 (1998) Aug. '98 LED:02 (Shining spotlight on person not necessarily a "seizure")

State v. Knox, 86 Wn. App. 831 (Div. II, 1997) Oct. '97 LED:12 (Motioning driver of parked car to roll down window not necessarily a "seizure")

2. *May a Terry stop detainee be arrested for for violating Washington's obstructing statute for merely refusing to identify himself or herself?*

No. Compare State v. White, 97 Wn.2d 92 (1982) April '82 LED:02; Carey v. Nevada Gaming Control Board, 279 F.3d 873 (9th Cir. 2002) Jan. '03 LED:02 with Hiibel v. Sixth Jud. Dt. Of Nevada, 124 S.Ct. 2451 (2004) Aug. '04 LED:02 (arrest under a Nevada "stop and identify" statute that is worded differently than Washington's "obstructing" statute).

3. *Is a show of authority when attempting a stop a "seizure"?*

California v. Hodari D., 499 U.S. 621 (1991) July '91 LED:01 (No seizure under Fourth Amendment if suspect flees from show of authority. BUT SEE State v. Young, 135 Wn.2d 498 (1998) Aug. '98 LED:02 - - Washington Constitution takes contrary view of "seizure."

Under Washington constitution, show of authority itself may be "seizure" even if no compliance by suspect.

4. *May MV passengers routinely be asked for ID?*

No. See State v. Larson, 93 Wn.2d 638 (1980) Aug. '80 LED:01 (Directing passenger in illegally parked car to show ID was unlawful seizure). State v. Rankin, 151 Wn.2d 689 (2004) Aug. '04 LED: 07 (Washington Supreme Court majority opinion interprets State v. Larson broadly, rejecting the argument that it is ok for officers to routinely request, so long as they do not demand, ID from non-violator, non-suspect passengers during traffic stops); In re Brown, 154 Wn.2d 787 (2005) Sept. '05 LED:17 (Washington Supreme Court holds that Rankin rule applies to requests to passengers for identifying information as well as to requests for ID documents); State v. Mote, 129 Wn. App. 276 (Div. I, 2005) Nov. '05 LED:10 (Court of Appeals holds Rankin rule does not extend to non-seizure contacts with occupants in parked vehicles).

5. *Is it an impermissible extension of a seizure to delay completion of a traffic ticket while waiting to learn if the driver has any outstanding arrest warrants?*

No, holds State v. Rife, 81 Wn. App. 258 (Div. I, 1996) Aug. '96 LED:17, on the constitutional question, as this is a minimal additional intrusion. *But see* State v. Rife, 133 Wn.2d 140 (1997) Oct. '97 LED:03 (State Supreme Court rules, solely on statutory grounds, that officer lacked authority to hold jaywalker only for warrant check -- the legislation at RCW 46.61.021 has since been amended to allow the warrant check -- Nov. '97 LED:03)

6. *Does "community caretaking function" give officers authority to make "stops" for non-investigative purposes in order to help citizens?*

State v. Kinzy, 141 Wn.2d 373 (2000) Sept. '00 LED:07 (Washington Supreme Court holds that this function did not justify an officer's seizure of a young-looking teenage girl out late on a school night with older, drug-historied companions, in downtown Seattle)

State v. Acrey, 148 Wn.2d 738 (2003) May '03 LED:04 (In an 8-1 decision, Washington Supreme Court distinguishes Kinzy and holds that it was ok for officers to detain a 12-year-old long enough to call his mother where the officers had responded at 12:40 a.m. to a report of youths fighting -- which they credibly denied -- and the youths

were located in an “isolated” commercial area with no nearby residences or open businesses)

7. *May consent to search be sought routinely during or after MV stop for a civil infraction or minor offense or is this additional intrusion an impermissible extension of the seizure?*

State v. Cantrell, 70 Wn. App. 340 (Div. II, 1993) Oct. '93 LED:21 (After speeding ticket signed by violator, it was unlawful seizure for officer to extend stop by asking for consent to search MV)

Ohio v. Robinette, 519 U.S. 33 (1996) Feb. '97 LED:02 (U.S. Supreme Court rules that after completion of traffic stop police obtained valid consent to search without first telling detainee that he was free to go; beware, however, of 11/12/97 Ohio Supreme Court decision on remand holding that police unlawfully extended the traffic stop when they pursued consent to search after issuing the ticket)

See two-page article on this issue in the October '96 LED at pages 19-21. The article also discusses the recent decision of Division Three in State v. Henry, 80 Wn. App. 544 (Div. III, 1995). The article suggests that, if officers are going to attempt to get consent to search in traffic stop circumstances where they lack “reasonable suspicion” to justify extending the stop, they use either a “clear break” or an “in the process” method of requesting consent. In light of Henry and recent case law from other jurisdictions placing restrictions on what questions may be asked without reasonable suspicion during a routine traffic stop, the “clear break” approach appears to be the more defensible approach legally.

8. *May officers who do not have reasonable suspicion as to a drug violation bring a drug-sniffing dog to sniff the exterior of a vehicle if the use of the dog does not extend the duration of the traffic stop?*

Illinois v. Caballes, 125 S.Ct. 834 (2005) March '05 LED:03, April '05 LED:02 (United States Supreme Court rules that this does not violate the Fourth Amendment of the U.S. Constitution; a different ruling might be made under article 1, section 7 of the Washington constitution, but there are as yet no Washington appellate court decisions on point).

9. *Does the Washington constitution permit roadblocks?*

City of Seattle v. Mesiani, 110 Wn.2d 454 (1988) July '88 LED:14 (City of Seattle's DUI roadblock program held to violate article 1, section 7 of the Washington constitution)

State v. Silvernail, 25 Wn. App. 185 (Div. I, 1980) April '80 LED:04 (Stopping and inquiring of the occupants of every car coming off the ferry from Vashon to West Seattle held supported by report from victims of just-committed robbery that gave police reasonable suspicion that robbers had taken that particular ferry to the mainland)

10. *Does Terry authority extend to non-traffic civil infractions?*

State v. Duncan, 146 Wn.2d 166 (2002) June '02 LED:19 (Washington Supreme Court says "no" as it holds in an "open container" case that officer must have probable cause to believe that the infraction is occurring in his or her presence before making a seizure or frisk – regardless of Duncan, however, officers obviously will and must take reasonable safety precautions, including frisking non-traffic civil infraction suspects reasonably believed to be armed and dangerous)

11. *When does a "seizure" become an "arrest"?*

Dunaway v. New York, 442 U.S. 200 (1979) July '79 LED:01 (Involuntary transport to stationhouse for questioning is per se an arrest)

Kaupp v. Texas, 123 S.Ct. 1843 (2003) July '03 LED:19 (Forcible transport of suspect to station per se an arrest requiring probable cause per Fourth Amendment)

State v. Belieu, 112 Wn.2d 587 (1989) Sept. '89 LED:17, and State v. Mitchell, 80 Wn. App. 143 (Div. I, 1995) March '96 LED:09 (Felony stop procedures not necessarily an "arrest" -- depends on circumstances)

State v. Wheeler, 108 Wn.2d 230 (1987) Aug. '87 LED:08 (Two-block transport of burglary suspect to scene of burglary for show-up ID not an arrest under the circumstances; review on totality of circumstances: (1) length of time, (2) place of detention, (3) movement of detainee, (4) nature of restraints)

State v. Radka, 120 Wn. App. 43 (Div. III, 2004) March '04 LED:11 (Putting suspended driver in back seat of patrol car and telling him he is under arrest held not a "custodial arrest" for "search incident")

purposes where he was not frisked, searched, or handcuffed, and he was allowed to use cell phone while sitting in the patrol car)

B. The Information, Or Level-Of-Suspicion, Continuum

1. *What constitutes articulable "reasonable suspicion"?*

Illinois v. Wardlow, 528 U.S. 119 (2000) March '00 LED:02 (U.S. Supreme Court holds that unprovoked, headlong flight at sight of police car by person in area known for heavy drug trafficking is "reasonable suspicion" under the "totality of the circumstances")

State v. Sweet, 44 Wn. App. 226 (Div. I, 1986) Oct. '86 LED:18 (Flight at sight of officers a factor in reasonable suspicion)

Florida v. J.L., 529 U.S. 266 (2000) May '00 LED:07 (U.S. Supreme Court holds that anonymous phone call regarding young man in plaid shirt at bus stop with a gun failed to meet the "reasonable suspicion" test, and therefore seizure and frisk was unlawful)

State v. Hopkins, 128 Wn. App. 855 (Div. II, 2005) Oct. '05 LED:09 (Where officers did not call back to get more details, citizen informant's call on cell phone to report possible juvenile in possession of handgun was not shown, on the totality of the circumstances, to establish reasonable suspicion for Terry seizure of suspect, nor were there sufficient corroborating observations to support the Terry seizure)

State v. Almanza-Guzman, 94 Wn. App. 563 (Div. I, 1999) June '99 LED:13 (Division One holds that officers did not have "reasonable suspicion" to stop a man known to be in possession of a gun and suspected of being in violation of the law requiring that an alien with a gun have an alien firearm license --- facts (1) that suspect's primary language appeared to be Spanish and (2) that alien firearm licenses are rarely issued did not justify seizure for investigation.)

Campbell v. DOL, 31 Wn. App. 833 (Div. I, 1982) Aug. '82 LED:04 (Conclusory statement to officer that driver of car going by is "drunk" does not justify stop, nature of crime and alternative investigative options are factors in reasonableness-of-seizure determination)

State v. Anderson, 51 Wn. App. 775 (Div. III, 1988) Oct. '88 LED:10 (Known citizen's action of pointing out car and making weaving gesture justified stop)

State v. Jones, 85 Wn. App. 797 (Div. III, 1997) Aug. '97 LED:16 (Unknown driver of marked commercial vehicle was not a sufficiently reliable source, even though he had made an in-person report)

State v. Stroud, 30 Wn. App. 392 (Div. II, 1981) Feb. '81 LED:05 (Late hour, high-crime area not enough to justify stop)

State v. Lyons, 85 Wn. App. 268 (Div. II, 1997) Aug. '97 LED:18 (holding that RCW 46.20.349 lawfully authorizes stop of vehicle based on reasonable suspicion that registered owner of MV has revoked or suspended driver's license). But see State v. Penfield, 106 Wn. App. 157 (Div. III, 2001) Aug. '01 LED:12, which holds that, while a MV stop to check for the registered owner was permissible under the Lyons-type facts, the officer was not permitted to extend the stop to ask for ID when the reasonable suspicion evaporated once the officer noticed that the driver could not be the person identified by records as the registered owner. Note also the McKinney decision below Part II.A.9., where the Washington Supreme Court ruled that random license checks for warrants and other information on registered owners of MVs are lawful.

State v. Barber, 118 Wn.2d 335 (1992) April '92 LED:02 (Beware of irrelevant statements about racial incongruity with the neighborhood)

State v. Mitchell, 80 Wn. App. 143 (Div. I, 1995) March '96 LED:09 (Holding dangerous suspect at gun point not necessarily an arrest; case also addresses "reasonable suspicion" question regarding a handgun that a citizen was carrying in his hand while walking in a residential area)

State v. Perea, 85 Wn. App. 339 (Div. II, 1997) June '97 LED:02 (Seven-day-old information about license suspension may justify MV stop)

U.S. v. Arvizu, 122 S. Ct. 744 (2002) April '02 LED:02 (Totality of circumstances, including officer's experience and training must be considered by the courts)

2. *What constitutes "probable cause"?*

State v. Smith, 102 Wn.2d 449 (1984) Nov. '84 LED:11 (Aguilar-Spinnelli standard controls informant-based arrest per independent grounds reading of state constitution, both for arrest and search)

State v. Huff, 64 Wn. App. 641 (Div. II, 1992) April '98 LED:09 (Smell of controlled substances coming from interior of just-stopped MV gives PC to arrest all MV occupants; Huff involves meth smell but cites Washington cases involving burning marijuana smell emanating from just-stopped MV)

Maryland v. Pringle, 124 S.Ct. 795 (2003) Feb. '04 LED:02 (U.S. Supreme Court holds under 4th Amendment that, after car with passengers in the front and back seats was stopped for a traffic violation, discovery of cocaine lying under an arm rest in the backseat of the car, just after the officer had spotted a large quantity of cash in the glove box, was justification for arresting all persons in the car, including the front seat passenger, despite his lack of ownership or control of car)

3. *Is there a "pretext stop" prohibition?*

Whren v. U.S., 517 U.S. 806 (1996) Aug. '96 LED:09. U.S. Supreme Court holds under Fourth Amendment that there is no pretext stop rule; probable cause as to violation justifies stop regardless of officer's motive). However, on July 1, 1999, in State v. Ladson, 138 Wn.2d 343 (1999) Sept. '99 LED:05, the Washington State Supreme Court interpreted article 1, section 7 of the Washington Constitution as imposing a pretext stop prohibition, the violation of which can be proven through either: (1) subjective evidence (showing the officer had a pretextual motive through his or her own admissions) or (2) objective evidence (showing the officer didn't follow normal or standard practices and procedures for that officer)

See also State v. DeSantiago, 97 Wn. App. 446 (Div. III, 1999) Nov. '99 LED:12 (Court applies Ladson pretext rule to suppress evidence seized by patrol officer following a pretext stop)

And see State v. Rainey, 107 Wn. App. 129 (Div. III, 2001) Sept. '01 LED:20 (Court remands drug possession case to superior court for hearings to determine whether a traffic stop for "no front license plate" during Columbia Gorge "emphasis patrol" was an unlawful pretextual stop to check for drug law violations by Tom Petty concert-goers)

But see State v. Hoang, 101 Wn. App. 732 (Div. I, 2000) Nov. '00 LED:08 (Court upholds trial court finding of "NO pretext" where officer testified believably that, though he had other suspicions as well, he made stop for traffic enforcement reasons; officer's failure to issue citation after finding illegal drugs is not per se evidence of pretext)

NOTE - - State v. Davis, 35 Wn. App. 724 (Div. I, 1983) Jan. '84 LED:06 (Court holds in pre-Ladson decision that arrest on a valid warrant can never be pretextual); State v. Goodin, 67 Wn. App. 623 (Div. II, 1993) March '93 LED:17 (same rule for entry on search warrant); State v. Busig, 119 Wn. App. 381 (Div. III, 2003) Feb. '04 LED:16 (Search under a search warrant that was issued to allow officers to search a third party's residence to make an arrest on an arrest warrant held not subject to pretext challenge)

C. Frisk Authority And Related Officer-safety Issues

1. *What constitutes reasonable belief of danger?*

State v. Collins, 121 Wn.2d 168 (1993) July '93 LED:07 (Court says question is, on totality of circumstances, whether the officer had a founded suspicion such that frisk was "not arbitrary or harassing".)

State v. Horrace, 144 Wn.2d 386 (2001) Oct. '01 LED:05 (Because driver leaned over toward front-seat passenger as officer was conducting a radio check during a 1:15 a.m. traffic stop, the passenger was subject to a lawful frisk once the officer learned of and acted on information that the driver was subject to custodial arrest based on arrest warrants and based on driving while license suspended)

2. *Is the test purely objective?*

State v. Coutier, 78 Wn. App. 239 (Div. III, 1995) Oct. '95 LED:04 (Court of Appeals asserts that if officer not concerned about safety, then frisk not justified even if reasonable officer would have been concerned--this appears to be erroneous subjective standard, but officer might have avoided by testifying as to training and experience)

3. *May frisk be search for evidence?*

State v. Alcantara, 79 Wn. App. 362 (Div. I, 1995) Feb. '96 LED:11 (Suspicion lacking probable cause basis that person may

have secreted drugs in pocket doesn't justify frisking or searching pocket)

4. *May driver routinely be directed into or out of MV?*

State v. Kennedy, 107 Wn.2d 1 (1986) Dec. '86 LED:01 (Apparently adopting U.S. Supreme Court view -- Pa. v. Mimms, 434 U.S. 106 (1977) --that driver can be directed out of MV without articulable grounds)

State v. Belieu, 112 Wn.2d 587 (1989) Sept. '89 LED:17 (Citing Mimms for the above principle)

5. *May passengers routinely be directed into or out of MV?*

Maryland v. Wilson, 519 U.S. 408 (1997) April '97 LED:02. (The U.S. Supreme Court holds by a 7-2 decision that Pa. v. Mimms applies to give officer automatic authority to order a passenger out of a lawfully stopped MV)

State v. Mendez, 137 Wn.2d 208 (1999) March '99 LED:04 (In an "independent grounds" ruling under Wash. Constitution, art. 1, sec. 7, State Supreme Court holds that, while officers have automatic or "bright line" authority to direct *drivers* out of, or back into, their vehicles during routine traffic stops, under a newly announced "heightened awareness of danger" test, officers must be able to articulate an objective reason for directing *passengers* (at least where such passengers have themselves committed no violation) out of, or back into, vehicles in such routine traffic stops.)

6. *When may MV's be "frisked"?*

Michigan v. Long, 463 U.S. 1032 (1983) Sept. '83 LED:08 (Frisk under same safety standard as governs frisk of person); see also State v. Belieu, cited above at I.C.4.

State v. Glossbrener, 146 Wn.2d 670 (2002) Sept. '02 LED:07 (Frisk of car held not justified under objective standard where, after observing driver lean over front-passenger seat while pulling over at outset of traffic stop, officer did not frisk car immediately, but instead: (1) left suspect in suspect's car and returned to patrol car to run radio check for warrants, and then (2) did FST's – which suspect successfully performed – before calling for back-up and doing a car frisk)

7. *When is a residence subject to "protective sweep"?*

Maryland v. Buie, 494 U.S. 325 (1990) May '90 LED:02 (Officer safety is the justification -- is there individualized reasonable suspicion that others may be in residence and may pose danger to officers?)

State v. Boyer, 124 Wn. App. 593 (Div. III, 2004) Feb. '05 LED:10 (Court of Appeals holds that there was not individualized reasonable suspicion that others were in residence and could pose danger to officers)

8. *Cross-gender pat-down considerations? (No)*

In Jordan v. Gardner, 986 F.2d 1521 (9th Cir. 1993) July '93 LED:09, the Federal Court barred routine cross-gender pat-downs in prison setting. The majority holding was narrowly limited to the special facts of the case. Wasberg view is that this case has no impact on street frisk setting. Officers must act reasonably and professionally, of course.

9. *When does "plain feel" justify seizure of evidence?*

Minnesota v. Dickerson, 508 U.S. 366 (1993), Sept. '93 LED:15; State v. Hudson, 124 Wn.2d 107 (1994), Oct. '94 LED:06 (U.S. Supreme Court and Washington Supreme Court state restrictive standard for "plain feel" seizure -- must recognize nature of contraband at or before completion of frisk)

10. *Can frisk be conducted by emptying suspects' pockets, rather than patting them down?*

State v. Fowler, 76 Wn. App. 168 (Div. III, 1994) May '95 LED:14 (No "single scoop" authority)

11. *Are there limits on when officer can accompany an arrestee into private premises following arrest?*

State v. Chrisman, 100 Wn.2d 814 (1984) April '84 LED:01 (Under article 1, section 7 of the Washington constitution, the mere fact of an MIP arrest doesn't justify entry into 11th floor WSU dorm room in the absence of other articulable suspicions; the Chrisman decision is limited somewhat by its factual context, but officers should at least warn a person who wants to re-enter his or her private residence following arrest -- for example, to put on pants, to let the cat out, or put out the fire in the fireplace -- that

the officer will retain control of the arrestee upon re-entry of the residence)

12. ***Frisking during warrant execution -- see II.B.5 below.***

13. ***Securing weapons.***

State v. Cotten, 75 Wn. App. 669 (Div. II, 1994) May '95 LED:15 (Weapons may always be secured while officers conduct lawful search)

D. **Arrest Authority (See also Parts II.D. and II.E below re: “search incident to arrest”)**

1. ***Misdemeanor presence rule (RCW 10.31.100).***

State v. Green, 150 Wn.2d 740 (2004) March '04 LED:08; May '04 LED:02 (Washington Supreme Court holds that failure to transfer title is not a “continuing offense” and therefore arrest and “search incident” were unlawful); State v. Walker, 129 Wn. App. 572 (Div. III, 2005) Nov. '05 LED:22 (Court of Appeals extends Green’s arrest restriction to Terry stops - - prosecutor has filed a petition seeking Washington Supreme Court review)

2. **Extraterritorial arrest authority**

a. **RCW10.93.070 provides:**

In addition to any other powers vested by law, a general authority Washington peace officer who possesses a certificate of basic law enforcement training or a certificate of equivalency or has been exempted from the requirement therefor by the Washington state criminal justice training commission may enforce the traffic or criminal laws of this state throughout the territorial bounds of this state, under the following enumerated circumstances:(1) Upon the prior written consent of the sheriff or chief of police in whose primary territorial jurisdiction the exercise of the powers occurs; (2) In response to an emergency involving an immediate threat to human life or property; (3) In response to a request for assistance pursuant to a mutual law enforcement assistance agreement with the agency of primary territorial jurisdiction or in response to the request of a peace officer with enforcement authority; (4) When the officer is transporting a prisoner;(5) When the officer is executing an arrest warrant or search warrant; or (6) When the officer is in fresh pursuit, as defined in RCW

10.93.120. [NOTE: fresh pursuit authorized both as to criminal offenses and traffic infractions]

b. Beware

In State v. Bartholomew, 56 Wn. App. 617 (Div. I, 1990) April '90 LED:03, the Court of Appeals held that RCW 10.93.070(5) did not authorize Seattle P.D. officers -- who were not part of a task force with Tacoma and were not acting under a consent letter from the Tacoma chief -- to tag along on a Pierce County warrant being executed in Tacoma by Tacoma P.D. officers. In State v. Rasmussen, 70 Wn. App. 853 (Div. I, 1993) April '94 LED:12, however, the Court held that officers with a consent letter from the chief of police of another jurisdiction are not restricted by the rationale of Bartholomew from taking action in that other jurisdiction.

c. If outside one's territory, then no authority to act as officer, but then citizen's arrest standard applies. See State v. Harp, 13 Wn. App. 239 (Div. I, 1975)

4. Arrest in Washington for felonies committed in other states.

RCW 10.88.330-- Arrest of person charged with felony in the courts of another state expressly authorized

Common law-- There is no Washington case directly deciding the issue but there is case law elsewhere that an arrest can be made solely on probable cause as to felony committed in other state (State v. Klein, 130 N.W.2d 816 (Wis. 1964)), but there is some suggestion in other cases that express statutory authority is required (note that RCW 10.31.100 may qualify) -- if at all possible, get legal advice in the case at hand before arresting without a warrant in this circumstance.

II. SEARCH WITH, WITHOUT A WARRANT

A. Defining "Search"-- Reasonable Privacy Expectations

1. "Open view" and "plain view" concepts

Many Washington appellate court cases refer to "open view" as the test of whether a "search" has occurred for constitutional purposes. No "search" occurs if the officer is lawfully in a position outside of a protected private area and is able to make observations into the protected area using only his or her own

senses or using only permissible sense enhancements. Such observations do not justify immediate entry into the protected area unless one of the exceptions to the constitutional search warrant requirement (e.g. exigency) apply.

State v. Wilson, 97 Wn. App. 578 (Div. III, 1999) Jan. '00 LED:07 (Naked-eye observation from airplane at 500 feet of marijuana grow in roofless shed did not violate state constitutional privacy rights of property owner; officers' observations gave them probable cause that supported issuance of a search warrant)

State v. Bobic, 140 Wn.2d 250 (2000) June '00 LED:14 (Naked-eye observation, without flashlight, through pre-existing hole in storage unit wall into neighboring storage unit was not "search")

U.S. v. Sandoval, 200 F.3d 659 (9th Cir. 2000) Aug. '00 LED:03 (9th Circuit holds that camper trespassing on federal BLM land had a privacy interest in his makeshift abode in cave; case law in Washington and elsewhere is mixed on the question of the arguable privacy interest of a trespasser in his or her tent, "Hovertown" shack, cave, cardboard abode, or other makeshift home)

"Plain view" justifies immediate seizure of evidence. Plain view was formerly said to have three elements: (1) lawful presence of an officer inside an otherwise protected private area; (2) immediate recognition (under a PC standard) of an item as evidence or contraband; and (3) *inadvertence in coming across the item*. In Horton v. Calif., 496 U.S. 128 (1990) Aug. '90 LED:02, the U.S. Supreme Court held that there is no third element of "inadvertence." In State v. Goodin, 67 Wn. App. 623 (Div. II, 1992) March '93 LED:17, and in State v. Hoggatt, 108 Wn. App. 257, 270 (Div. II, 2001), Division Two of our Court of Appeals agreed. See *also* the State Supreme Court decision in State v. Hudson, 124 Wn.2d 107 (1994) Oct. '94 LED:06 (State Supreme Court recognizes Horton test in "plain feel" case. (NOTE: "Plain feel" discussed above at I.C.9.) But beware: Washington appellate decisions continue, from time to time, in contexts where it does not matter, to erroneously recite the "inadvertence" element of the "plain view" test.

See also State v. Cheatam, 150 Wn.2d 626 (2003) Feb. '04 LED:05 (No search warrant was needed for police to take a "second look" in the jail property room at the soles of shoes that had been taken from an arrestee at the time of booking)

2. *Entry of curtilage of residence not apparently open to the public is a “search”; and there is no “open fields” exception to the search warrant requirement under the Washington constitution*

State v. Johnson, 75 Wn. App. 692 (Div. II, 1994) Jan. '95 LED:19 (Rural farm owner with fenced and gated property, posted with "No Trespassing" signs, had state constitutional privacy protection)

State v. Thorson, 98 Wn. App. 528 (Div. I, 1999) Feb. '00 LED:02 (Unfenced, un-posted, heavily-wooded property with orchard on remote rural island was protected from warrantless search under article 1, section 7 of the Washington constitution)

State v. Hoke, 72 Wn. App. 869 (Div. I, 1994) Jan. '95 LED:06 (Entry of brush-and-junk-shielded yard of home unlawfully invaded "curtilage" because officer went farther than a reasonably respectful citizen would go). COMPARE State v. Gave, 77 Wn. App. 333 (Div. II, 1995) Aug.'95 LED:14 ("No trespassing" signs alone generally don't establish constitutional privacy protection that would prohibit officers from knocking on the front door during the daytime) with State v. Boethin, 126 Wn. App. 695 (Div. II, 2005) June '05 LED:05 (Officer's leaving of the porch area to sniff at the closed doors of an adjoining garage invaded the privacy rights of the resident under article 1, section 7 of the Washington Constitution).

State v. Ross, 141 Wn.2d 304 (2000) Sept. '00 LED:02 (Late-night hour, lack of intent to contact resident, and lack of “legitimate police business” added up to a violation of Fourth Amendment and state constitutional privacy rights where undercover officers went into the impliedly open rear driveway of a residence at midnight to sniff at the garage for a suspected “marijuana grow”)

State v. Littlefair, 129 Wn. App. 330 (Div. II, 2005) Nov. '05 LED:13 (Privacy protection extended to back yard area of two-acre parcel, where homeowner had posted “private property” and “no trespassing” signs alongside the roadway approaching his home, and the officer entered the backyard area around midnight dressed in camouflage)

State v. Dyreson, 104 Wn. App. 703 (Div. III, 2001) May '01 LED:15 (Enclosed garage gets protection against warrantless police entry even though: (1) door open, (2) loud music inside, and (3) renter directed officer to look for owner-resident inside garage)

3. *Toilet stall privacy*

Tukwila v. Nalder, 53 Wn. App. 746 (Div. I, 1989) Sept. '89 LED:17 (Holds it a privacy invasion for officer to peer over toilet stall door on a hunch that its single occupant was engaged in masturbation)

Compare State v. White, 129 Wn.2d 105 (1996) July '96 LED:15 (Holding that toilet stall is not a protected private area for purposes of Payton v. New York rule restricting entry to make warrantless arrest)

4. *Using a flashlight or binoculars is not a "search" under ordinary circumstances, but there are limits*

State v. Rose, 128 Wn.2d 388 (1996) March '96 LED:02 (Taking flashlight onto front porch and shining it into uncurtained window accessible from porch not a search)

State v. Jones, 33 Wn. App. 275 (Div. I, 1982) Feb. '83 LED:13 (Officers OK in watching parking lot cocaine use activity through binoculars – it is OK to use binoculars to observe activity that could be lawfully be observed with the naked eye but for the need to maintain cover)

5. *Manipulating soft luggage may be a "search"*

Bond v. U.S., 529 U.S. 334 (2000) June '00 LED:12 (Manipulating soft luggage taken from overhead rack during bus sweep held to be "search")

6. *Warrant needed to get telephone long distance records and unlisted phone subscriber information under Washington constitution (presumably similar privacy protection is extended to bank records where access is not expressly authorized by statute, though there is no Washington case on point, and federal cases do not extend privacy protection to bank records)*

State v. Gunwall, 106 Wn.2d 54 (1986) Aug. '86 LED:04 (Long distance toll call records); State v. Butterworth, 48 Wn. App. 152 (Div. I, 1987) Aug. '87 LED:19 (unlisted subscriber information)

7. *Warrant needed to search garbage cans and to use thermal detection devices under Washington constitution*

State v. Boland, 115 Wn.2d 571 (1990) Jan. '91 LED:02; State v. Sweeney, 107 P.3d 110 (Div. III, 2005) April '05 LED:15 (Boland and Sweeney involved garbage can searches at single-family residences) [NOTE: communal dumpsters, however, do not generally get same privacy protection -- see State v. Rodriguez, 65 Wn. App. 409 (Div. III, 1992) Oct. '92 LED:06]

State v. Young, 123 Wn.2d 173 (1994) April '94 LED:02 (Warrant required for use of thermal detection device on residence); See also, Kyllo v. U.S., 533 U.S. 27 (2001) Aug. '01 LED:07 (Fourth Amendment also bars warrantless use of thermal detection device on residence)

8. *Using a drug-sniffing dog to check packages in transit is not generally restricted but using a drug sniffing dog at a residence or to sniff people apparently requires a search warrant.*

State v. Dearman, 92 Wn. App. 630 (Div. I, 1998) Nov. '98 LED:06 (holding that use of drug-sniffing dog at residence required search warrant; distinguishing prior packages-in-transit cases) .

B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260 (9th Cir. 1999) Dec. '99 LED:12. (Using drug-dog to randomly sniff students at high school violates Fourth Amendment.

Illinois v. Caballes, 125 S.Ct. 834 (2005) March '05 LED:03, April '05 LED:02 (United States Supreme Court rules that using a drug-sniffing dog to sniff the exterior of a car during a traffic stop that is not prolonged by the dog sniff does not violate the Fourth Amendment of the U.S. Constitution; a different ruling might be made under article 1, section 7 of the Washington constitution, but there are as yet no Washington appellate court decisions on point).

9. *Checking DOL records not a "search"*

State v. McKinney, 148 Wn.2d 20 (2002) Jan. '03 LED:05 (Random checking of license plates against DOL database and then checking that information against WACIC database does not violate privacy rights of citizens under article 1, section 7 of WA constitution)

10. *Abandoned property not protected.*

State v. Whitaker, 58 Wn. App. 851 (Div. I, 1990) Nov. '90 LED:07 (tossing of illegal drugs as officers approached held to be

abandonment of the drugs); State v. Kealey, 80 Wn. App. 162 (Div. II, 1995) May '96 LED:05 (Purse left in store not "abandoned" because owner did not discard it, but OK under "community caretaking function" for police to look for ID to help find owner)

11. "Day visitor" to home not protected by Fourth Amendment

Minnesota v. Carter, 525 U.S. 83 (1998) Feb. '99 LED:04 (Coke dealers making consenting two-hour use of home to process product were not entitled to Fourth Amendment protection – NOTE: Washington appellate courts would probably find privacy protection under article 1, section 7 of the Washington constitution for such consensual visitors)

12. *Installing, tracking GPS system may or may not require warrant*

State v. Jackson, 150 Wn.2d 521 (2003) Nov. '03 LED:02 (In case in which officers *did* obtain a search warrant to install and track a global position system (GPS) tracking device, the Washington Supreme Court holds in an "independent grounds" interpretation of article 1, section 7 of the Washington constitution in that a search warrant is required for such law enforcement intrusion; the Court upholds the warrant in this case, ruling that probable cause supported the search warrant.

13. Checking motel guest register with consent of motel operator does not require search warrant

State v. Jorden, 107 P.3d 130 (Div. II, 2005) April '05 LED:07 (No privacy under article 1, section 7 of Washington constitution)

B. Search With A Warrant -- Writing and Executing

1. *Officer misstatements in the affidavit (reckless or worse)*

Turngren v. King County, 104 Wn.2d 293 (1985) Nov. '85:03 (Plaintiffs in civil suit alleged that affiant officer misstated the informant's story and failed to include important negative information)

State v. Jones, 55 Wn. App. 343 (Div. II, 1989) Jan. '90 LED:07 (Informant had recanted information in previous investigation -- affiant officer should have said so)

State v. Stephens, 37 Wn. App. 76 (Div. III, 1984) July '84 LED:13 (Officer's statement in affidavit that he "observed" person watering marijuana grow, when he in fact only deduced that fact, held in criminal case to be intentionally deceptive or, alternatively, too conclusory).

2. "Rubber stamp" judge could lead to liability

Malley v. Briggs, 475 U.S. 335 (1986) June '86 LED:17 (Officer must have reasonable belief that affidavit establishes PC, or § 1983 federal liability possible)

3. CI's: possibility of disclosure

State v. Thetford, 109 Wn.2d 392 (1987) Jan. '88 LED:05 (Informant so entangled with police in terms of financing and direction that confidentiality lost); State v. Selander, 65 Wn. App. 134 (Div. II, 1992) Nov. '92 LED:17 (Allegations that affiant-officer knew -- in light of previously observed, sealed-up windows of garage -- that CI had trespassed into garage were sufficient to trigger in camera hearing)

4. Knock and announce (wait time; exceptions)

Wilson v. Arkansas, 514 U.S. 927 (1995) Sept. '95 LED:03 (Case does not provide any black letter law guidance, but it makes the knock-and-announce requirement a part of the Fourth Amendment-- this has significant civil liability implications)

There are numerous Washington cases addressing the knock and announce rule. Unlike some states, Washington does not have a blanket exception to knocking and announcing for drug warrant executions. Case-specific reasons for not knocking and announcing must be given.

Issuing judges cannot give "no-knock" authorization. State v. Spargo, 30 Wn. App. 949 (Div. II, 1982) May '82 LED:02.

There is no blanket authorization for "no knock" entries in narcotics warrant cases; review is under totality of circumstances. Richards v. Wisconsin, 520 U.S. 385 (1997) Aug. '97 LED:07.

5. Frisking during warrant execution

Ybarra v. Illinois, 444 U.S. 85 (1979) Feb. '80 LED:01 (Search warrant for narcotics at tavern did not justify frisking patron at tavern)

State v. Broadnax, 98 Wn.2d 289 (1982) Feb. '83 LED:02 ("Presence plus" rule: individualized articulable reason for frisking those present needed even in narcotics warrant execution)

State v. Lennon, 94 Wn. App. 573 (Div. III, 1999) May '99 LED:04 (No justification to frisk non-occupant visitor who came to the front door as the warrant was being executed)

6. *Boilerplate problems ("all vehicles", "all persons")*

State v. Rivera, 76 Wn. App. 519 (Div. II, 1995) April '95 LED:05 (Boilerplate in warrant to search "all vehicles present" was not justified with particularity by affidavit)

State v. Carter, 79 Wn. App. 154 (Div. II, 1995) Nov. '95 LED:10 (Boilerplate in warrant to search "all persons present" was not justified with particularity by affidavit)

Marks v. Clarke, 102 F.3d 1012 (9th Cir. 1996) April '97 LED:08 (Spokane police subject to civil suit for searching "all persons on the premises" under a warrant to search a not-quite-den-of-thieves where affidavit didn't support the "all persons" clause)

7. *Particularity concerns -- persons, places, things, etc.*

State v. Kelley, 52 Wn. App. 581 (Div. II, 1988) Jan. '89 LED:12 (Warrant failed to mention outbuildings)

State v. Perrone, 119 Wn.2d 538 (1992) Nov. 92 LED:04 (Child porn warrant too broadly stated)

State v. Riley, 121 Wn.2d 22 (1993) July '93 LED:10 (Inadvertent failure to state specific crime being investigated made search warrant invalid)

Groh v. Ramirez, 124 S.Ct. 1284 (2004) April '04 LED:02 (Inadvertent failure by affiant-officer (an ATF agent) to identify in the warrant any items to be seized made the officer-affiant who prepared the search warrant subject to a federal civil rights lawsuit)

8. *Probable cause problems; Plus staleness concerns*

State v. Thein, 138 Wn.2d 133 (1999) Aug. '99 LED:15 (Officer-affiant's statement about experience and training re drug dealers' habits alone won't establish link of drug-dealing to a suspect's home)

State v. Johnson (Larry Edward), 104 Wn. App. 489 (Div. II, 2001) May '01 LED:05 (Court in molestation case rules search warrant partially unsupported under Thein analysis; also rules that viewing videotapes does not come within "plain view" exception)

State v. McReynolds, 104 Wn. App. 560 (Div. III, 2001) May '01 LED:11 (Court declares search warrant for burglar's residence unsupported under Thein analysis)

State v. Higby, 26 Wn. App. 457 (Div. II, 1980) Sept. '80 LED:05 (Two-week lapse between drug sale and search made information stale)

State v. Petty, 48 Wn. App. 615 (Div. I, 1987) Nov. '87 LED:04 (Similar time lapse of 2 weeks did not make information stale under common sense rule where marijuana grow suspected)

9. *Telephonic warrants*

State v. Smith, 87 Wn. App. 254 (Div. I, 1997) Nov. '97 LED:14 (If tape recording fails, reconstruction of affidavit must be based on judge's memory)

State v. Ettenhofer, 119 Wn. App. 300 (Div. II, 2003) Jan. '04 LED:12 (Where judge gave telephonic authorization to search but officers did not bring a paper search warrant to the scene of the search, the search was warrantless and unconstitutional under the Washington constitution)

10. *Anticipatory search warrants*

State v. Goble, 88 Wn. App. 503 (Div. II, 1997) Jan. '98 LED:15 (Affidavit must establish a "sure course" of evidence to place of search); State v. Nusbaum, 126 Wn. App. 160 (Div. II, 2005) April '05 LED:20 (Officers must wait for triggering event – here, signal-containing-package going inside the premises and being opened – before executing search).

C. Warrantless Entry Of Private Premises To Arrest

1. *Arrestee's own residence (Payton v. New York rule)*

Payton v. N.Y., 445 U.S. 573 (1980) June '80 LED:01. In the absence of exigent circumstances, fresh pursuit, or a search warrant, officers seeking to make a forcible (nonconsenting) entry to arrest a person from his or her residence must have: (1) an arrest warrant + (2) reason to believe the prospective arrestee is at home. In U.S. v. Gorman, 314 F.3d 1105 (9th Cir. 2002) March '03 LED:10, the Ninth Circuit of the U.S. Court of Appeals held that the "reason to believe" test of Payton is a "probable cause" standard.

State v. Holeman, 103 Wn.2d 426 (1985) April '85 LED:11. Ordering the person to come out of the house or reaching through the threshold to grab the prospective arrestee is the equivalent of a forced entry of the residence. Knocking at the door and requesting either voluntary consent to entry or voluntary exit by resident is permitted, but it is risky.

State v. McKinney, 49 Wn. App. 850 (Div. III, 1987) April '88 LED:12 (allows entry to make arrest on misdemeanor warrant). But beware –while limited case law nationally appears to place misdemeanor warrants squarely within the Payton rule, the Washington Supreme Court has never had an opportunity to look at applying the Payton rule to residential entries to execute misdemeanor warrants. Division Three of the Washington Court of Appeals recently raised some questions on this point in State v. Anderson, 105 Wn. App. 223 (Div. III, 2001) June '01 LED:13, where Division Three suggested -- citing questionable authority-- that there may be some circumstances where the legal restrictions on entry to arrest on a misdemeanor warrant are greater than on entry to arrest on a felony warrant. But a more recent Division Two decision indicates that all criminal arrest warrants are equal for purposes of the Payton rule. State v. Thompson, 112 Wn. App. 787 (Div. II, 2002) Oct. '02 LED:07 (arrest at residence on a bench warrant issued for contempt of court arising out of child support action comes under Payton because officers could not easily determine if warrant was criminal or civil). The Washington Supreme Court overruled in part this aspect of Division Two's Thompson decision, but only because the Supreme Court ruled that the contempt warrant was clearly for a "civil matter," and that RCW 10.31.040 does not allow forcible entry into dwellings to execute civil warrants. See State v. Thompson, 151 Wn.2d 793 (2004) Aug '04 LED:13.

2. *Third party's residence (Steagald v. U.S. rule)*

Steagald v. U.S., 451 U.S. 204 (1981) May-Aug. '81 LED:01. In the absence of exigent circumstances or fresh pursuit, officers seeking to make a forcible (nonconsenting) entry to arrest a person from a third party's residence (not also his or her own residence) must have a search warrant.

3. *Undercover entries as consenting entries*

State v. Nedergard, 51 Wn. App. 304 (Div. I, 1988) Aug. '88 LED:07 (Holds consent valid but scope of search limited by undercover role)

4. *Hot pursuit of misdemeanor offender into residence*

If officer has probable cause to believe that a person has committed DUI, or another serious crime with alcohol influence as element of crime, and the person tries to flee into a home, the officer apparently has the authority to forcibly enter the home and make an arrest. State v. Griffith, 61 Wn. App. 35 (Div. III, 1991) Sept. '91 LED:18 (Noting the special exigency of likely lost evidence – i.e., dissipation of alcohol -- if officer has to wait to get a search warrant).

However, where there is no articulable exigency, then it is much more difficult to argue that forcible, warrantless entry is permitted to force entry to carry out the probable cause arrest of one who is suspected of committing some other misdemeanor. *Compare* Seattle v. Altshuler, 53 Wn. App. 317 (Div. I, 1989) April '89 LED:17 (criminal case) with Altshuler v. Seattle, 63 Wn. App. 389 (Div. I, 1991) (Altshuler II is a civil case not reported in LED. Altshuler II suggests that Altshuler I's criminal case opinion may have been too restrictive re. hot pursuit issue, but leaves the issue in doubt).

See also State v. Bessette, 105 Wn. App. 793 (Div. III, 2001) Aug. '01 LED:14 (Holds that officer in hot pursuit of MIP suspect did not have exigent circumstances justifying non-consenting, warrantless entry of third party's residence to arrest suspect)

D. Warrantless Search Of Person Incident To Arrest

1. *There must first be an "arrest"*

State v. O'Neill, 148 Wn.2d 564 (2003) April '03 LED:03 (Under article 1, section 7 of Washington Constitution, the search may not precede the arrest -- do it "by the numbers")

2. *Crimes for which search incident permitted*

Case law allows a custodial arrest for any crime except for certain traffic crimes. See discussion in next section regarding searches of motor vehicles incident to arrest.

What if no intent to transport or book if nothing is found in search, e.g. reckless driving "arrest"? In State v. Brantigan, 59 Wn. App. 481 (Div. I, 1990) Feb. '91 LED:05, the Court of Appeals held that, because the search incident standard is an objective one, the officer's intent is irrelevant--if the crime is one for which an arrest *could* be made, then a search incident to arrest can be made even if the officer had not yet decided whether a custodial arrest would in fact be made in the case. However, see the cases cited under Part II. E. 1. below --"motor vehicle search incident."

3. *Timing of the search*

State v. Clayton Donald Smith, 119 Wn.2d 675 (1992) Dec. '92 LED:04 (A delay of 10 to 15 minutes before the officer looked inside a fanny pack taken from arrestee did not invalidate the search where the delay was due to other activity of the officer relating to the arrest and investigation)

4. *Scope of the search*

The U.S. Supreme Court held in its 1969 Chimel decision that the scope of the search extends to all items on the person of the arrestee and all areas into which the arrestee might lunge to get a weapon or to destroy evidence. State v. Clayton Donald Smith (cited above) holds that a fanny pack being carried by the arrestee when the arrest process begins can be searched following handcuffing of the arrestee, even though at that point the fanny pack is lying on the ground outside the "lunge area". The location of items when the arrest process begins will justify a search of such items. Note that, while the case law here and elsewhere allows for a thorough search of the person, as well his or her outer clothing, packages, and containers based on the mere fact of the arrest, the Court of Appeals has held in State v. Rulan C., 97 Wn. App. 884 (Div. I, 1999) May '99 LED:15 that a complete, cheek-spreading "strip search" at the scene of an arrest in a residence went beyond the permissible scope of a warrantless search incident to arrest.

5. *"Bright line" nature of authority*

State v. LaTourette, 49 Wn. App. 119 (Div. I, 1987) Dec. '87 LED:18 (Recognizes that the authority to search incident to arrest does not depend on fact-based probabilities that evidence or weapons will be found. The fact of the lawful arrest establishes the authority to search)

All containers are equally subject to “search incident”. State v. Lowrimore, 67 Wn. App. 949 (Div. I, 1992) March '93 LED:15.

6. *“Booking search” limits if arrest made on bail warrant*

State v. Gloria Smith, 56 Wn. App. 145 (Div. III, 1989) March '90 LED:12 & Feb. '91 LED:18 (Must allow person arrested on bail warrant to post bail to avoid “booking” search of personal effects; *suggestion*: be sure to search the personal effects in the field in the “search incident to arrest”)

State v. Ross, 106 Wn. App. 876 (Div. I, 2001) Sept. '01 LED:15 (The Gloria Smith bail-warrant-arrest rule does not limit searches in the field that are “incident to arrest”; therefore, where an officer from one jurisdiction handed over a bail-warrant-arrestee to an officer from another jurisdiction, the second officer could lawfully conduct a second “search incident” prior to continuing the transport of that prisoner to jail)

E. Warrantless Search Of M. Vehicle Incident To Arrest

1. *There must first be an “arrest”*

State v. O’Neill, 148 Wn.2d 564 (2003) April '03 LED:03 (Under article 1, section 7 of Washington Constitution, the search may not precede the arrest -- Do the arrest “by the numbers”)

State v. Radka, 120 Wn. App. 43 (Div. III, 2004) March '04 LED:11 (Putting suspended driver in back seat of patrol car and telling him he is under arrest held not a “custodial arrest” for “search incident” purposes where he was not frisked, searched, or handcuffed, and he was allowed to use cell phone while sitting in the patrol car)

State v. Pulfrey, 154 Wn.2d 517 (2005) Aug '05 LED:09 (Washington Supreme Court holds that in those circumstances where an officer has discretion whether to make a custodial arrest - - or instead to cite and release - - as a standard practice, the officer may make the custodial arrest, conduct a search incident to that arrest, and, after

completing the search, exercise discretion whether to cite and release the detainee or instead to take the detainee in for booking)

2. *Crimes for which search incident permitted*

Article in March 2003 LED addresses “search incident” following an “arrest” for DWLS.

State v. Reding, 119 Wn.2d 685 (1992) Dec. '92 LED:17 (Declares that custodial arrest OK for all of the traffic crimes which are listed in RCW 10.31.100(3) -- *but* beware of State v. Nelson, 81 Wn. App. 249 (Div. II, 1996) Sept. '96 LED:06 (indicating limits to Reding rule though upholding negligent driving arrest under former (criminal) negligent driving RCW)

State v. Brantigan, 59 Wn. App. 481 (Div. I, 1990) Feb. '91 LED:05, April '91 LED:19 (Holds that, if officer has authority to arrest at time of search, then search valid even where officer had not yet decided at that point whether to exercise such custodial arrest power)

State v. McKenna, 91 Wn. App. 554 (Div. II, 1998) Oct. '98 LED:05 (If officer clearly manifests at the time his intent not to make a custodial arrest, then no authority to "search incident")

Knowles v. Iowa, 525 U.S. 113 (1998) Feb. '99 LED:02 (Search held invalid by U.S. Supreme Court where Iowa statute permitted “search incident to traffic citation”)

Atwater v. City of Lago Vista, 532 U.S. 318 (2001) July '01 LED:18 (U.S. Supreme Court rules that the Fourth Amendment allows custodial arrest for all misdemeanors, even those punishable only by a fine; Washington constitution probably does not authorize arrest for fine-only misdemeanors, to the extent there may be such statutes or ordinances in Washington)

State v. O'Neill, 110 Wn. App. 604 (Div. III, 2002) June '02 LED:21 (Court upholds custodial arrest and "search incident" for driving while suspended even though officer did not comply with local policy that required checking with jail before arresting on this particular offense; the Court also holds that, where officer announced that driver was under arrest before the driver got out of the truck, the driver's act of locking the truck as he got out did not make the truck passenger area off-limits to a warrantless “search incident”)

3. Search following arrest of passenger, not driver

State v. Cass, 62 Wn. App. 793 (Div. II, 1991) Jan. '92 LED:06 (Arrest of passenger on warrant justified search of vehicle incident to that arrest)

4. Timing of search

State v. Boyce, 52 Wn. App. 274 (Div. I, 1988) Nov. '88 LED:02 (Vehicle search not incident to arrest if made after the arrestee has been taken away from the scene)

U.S. v. Vasey, 834 F.2d 782 (9th Cir. 1987) (30 to 45 minute delay before searching arrestee's vehicle was too long; search was no longer "incident to" the arrest)

State v. Boursaw, 94 Wn. App. 627 (Div.I, 1999) May '99 LED:07 (Delay of 10 minutes waiting for drug-sniffing K-9 to arrive OK)

5. Required link between arrestee and MV

State v. Fore, 56 Wn. App. 339 (Div. I, 1989) March '90 LED:05 (MV was subject to Stroud search where arrestee used car to commit crime moments earlier, and he was near the unlocked vehicle when the arrest was made) Note: If the suspect gets out of the vehicle and locks it before the arrest is made, the vehicle is probably not subject to a "search incident" under the Stroud rule. See State v. Perea, 85 Wn. App. 339 (Div. II, 1997) June '97 LED:02.

State v. Porter, 102 Wn. App. 327 (Div. I, 2000) Nov. '00 LED:05 (MV not subject to Stroud search where arrest on warrant was made 300 feet from the vehicle, and the vehicle was not linked to the basis for the arrest)

State v. Wheless, 103 Wn. App. 749 (Div. I, 2000) March '01 LED:04 (Holding MV "search incident" not permitted where arrest made in tavern bathroom, even though, during "buy-bust" operation being conducted by police, suspect had only moments earlier gone into his vehicle in the tavern parking lot 50-75 away)

State v. Johnston, 107 Wn. App. 280 (Div. II, 2001) Oct. '01 LED:19 (Vehicle search was not "incident to arrest" even though the arrest took place in the vicinity of the vehicle, because the arrestee had no ready access to the vehicle or immediate control of the vehicle at the time of the arrest)

State v. Turner, 114 Wn. App. 653 (Div. II, 2003) March '03 LED:15 (Vehicle search could not be upheld under "incident to arrest" rationale, as testimony and findings established that arrestee was "near" the open driver's side door, but did not establish how near the door he was when the arrest was made)

State v. Rathbun, 123 Wn. App. 372 (Div. II, 2004) Jan '05 LED:08 (Vehicle search could not be upheld under "incident to arrest" rationale because arrest process began over 40 feet from the vehicle, even though suspect had been standing near his vehicle when officers began to drive up his driveway to make contact with him)

Thornton v. U.S., 124 S. Ct. 2127 (2004) July '04 LED:02 (Under the Fourth Amendment, the arrestee's prior suspicious activity after he had spotted the officer while driving, and his physical location relatively near his car at the time of his later arrest were sufficient linkage in terms of time, space and behavioral link to his car to justify a warrantless searching of his car incident to his arrest, despite the fact that the officer's first contact with the suspect occurred after the suspect had gotten out of his car and had shut, but not locked, the door)

6. *Scope of the search -- "Bright line" rule*

State v. Stroud, 106 Wn.2d 144 (1986) Aug. '86 LED:01 (MV S. Incident extends to passenger area and unlocked containers in that area)

State v. Mitzlaff, 80 Wn. App. 184 (Div. II, 1995) March '96 LED:11 (Engine compartment is not within scope of Stroud)

State v. Johnson, 128 Wn.2d 431 (1996) March '96 LED:06 (MV search of long-haul trucker's cab sleeping area is within scope of Stroud rule)

U.S. v. Mayo, 394 F.3d 1271 (9th Cir. 2005) March '05 LED:07 (Hatchback area of vehicle is within scope of the Fourth Amendment MV search incident rule)

State v. Seitz, 86 Wn. App. 865 (Div. II, 1997) Nov. '97 LED:19 (Lawful arrest of car's driver doesn't justify search of purse held by passenger after she got out of car)

State v. Parker, State v. Jines, State v. Hunnel, 139 Wn.2d 486 (1999) Dec. '99 LED:13 (Where arrest is made of less than all of the

occupants of the vehicle, then the officer may not automatically search those personal effects which are left behind in the passenger area and which are known to belong to non-arrested person(s). Some question remains as to whether the standard limiting the search is “effects known to belong” or “effects reasonably believed to belong” to non-arrestees. Note, however, that in State v. Reynolds, 144 Wn.2d 282 (2001) Oct. ‘01 LED:09, the Washington Supreme Court stated in dicta (language not necessary to support the decision) that “known to belong” is the standard under Parker.)

State v. Jackson, 107 Wn. App. 646 (Div. I, 2001) Oct. ‘01 LED:16 (Under Parker rule, officers may search personal effects for ID where the occupants give confusing information about the ownership of those personal effects)

State v. Jones, 146 Wn.2d 328 (2002) July ‘02 LED:11 (Washington Supreme Court reverses the Court of Appeals and rules that driver who kept his gun in his girl-friend’s purse had “automatic standing” to raise a Parker objection to a police search of the purse following his arrest, and that the search was unlawful under Parker because the arresting officer knew that the purse belonged to the passenger and was not in control of the arrestee-driver)

State v. Boursaw, 94 Wn. App. 629 (Div. I, 1999) May ‘99 LED:07 (Removal of ashtray OK—this is not an impermissible dismantling of the vehicle)

State v. Vrieling, 144 Wn.2d 489 (2001) Oct. ‘01 LED: 02 (Entire readily-accessible passenger area of a Winnebago was subject to Stroud “search incident” where an occupant was custodially arrested in the Winnebago following a traffic stop) Also, the Court of Appeals had earlier held in Vrieling, 97 Wn. App. 152 (Div. I, 1999) Nov. ‘99 LED:07, that a zipped seat cushion was not a “locked” container under Stroud, and therefore officers could lawfully unzip the cushion and search its contents as part of a motor vehicle search incident to arrest.

F. Warrantless Search By Consent

1. *First party consent*

- a. Voluntariness considerations... e.g. consent forms, threats to get a warrant, warnings re rights, deception

State v. Apodaca, 67 Wn. App. 736 (Div. III, 1992) March '93 LED:13 (Threat to "get warrant" may make consent involuntary)

State v. O'Neill, 148 Wn.2d 564 (2003) April '03 LED:03 (Consent not "voluntary" if given after officer asserts that "search incident" standard would justify a warrantless search anyway)

State v. Ferrier, 136 Wn.2d 103 (1998) Oct. '98 LED:02 (Officers seeking consent in a knock-and-talk situation must give warnings advising occupant of the 3 R's – right to refuse, right to restrict scope, and right to revoke -- in order to obtain valid consent to search residence)

State v. Bustamonte-Davila, 138 Wn.2d 964 (1999) Nov. '99 LED: 02 (Ferrier rule does not apply to request for residential entry where officer's intent is to make arrest on INS order, not to search)

State v. Leupp, 96 Wn. App. 324 (Div. II, 1999) Oct. '99 LED:05 (Ferrier rule does not apply to request for residential entry to search for a possible DV victim)

State v. Williams (Harlan M.), 141 Wn.2d 17 (2000) Dec. '00 LED:14 (Request to homeowner to search residence for a felon-guest wanted on an arrest warrant is not subject to the Ferrier rule)

State v. Kennedy, 107 Wn. App. 972 (Div. II, 2001) Nov. '01 LED:06 (Full Ferrier warnings were required for officers to obtain valid consent to enter a motel room where the officers had gone to investigate after receiving a report of illegal drug-dealing by persons in the motel room)

State v. Khounvichai, 149 Wn.2d 557 (2003) Aug. '03 LED:06 (Ferrier warnings were not required for officers to obtain valid consent from a suspect's grandmother for purposes of entry of the grandmother's home just to "talk to" her grandson who lived there and who was a suspect in a malicious mischief case; the majority opinion suggests, however, that if probable cause for a search had developed in this situation, the officers would have been required to obtain a search warrant rather than then obtaining consent to search)

State v. Tagas, 121 Wn. App. 872 (Div. I, 2004) July '04 LED:13 (Ferrier warnings were not required to obtain consent to search purse of person to whom officer had offered a ride from the freeway to a nearby restaurant)

State v. Cole, 122 Wn. App. 319 (Div. II, 2004) Sept. '04 LED:23 (Advance written consent-to-search from a person who was a housemate of a person sentenced to home detention was valid for duration of EHD agreement)

U.S. v. Drayton, 122 S.Ct. 2105 (2002) Sept. '02 LED:02 (U.S. Supreme Court holds under 4th Amendment that no seizure occurred – and consent was voluntary -- in random bus sweep operation in which Florida officers asked Greyhound bus riders: 1) if they were carrying drugs, and 2) if they would consent to search; consents were held to be voluntary even though riders were not advised of right to refuse consent. BEWARE: Washington appellate courts are likely to be more restrictive on “bus sweep” issues of “seizure” and/or “consent” under article 1, section 7 of Washington Constitution)

b. Implied consent is possible, but beware

U.S. v. Shaibu, 920 F.2d 1423 (9th Cir. 1989) May '90 LED:09 (Silently turning and walking back into apartment following officer's request to enter is not implied consent for officers to follow)

2. *Third party consent -- Independent dominion & control + Assumed risk*

a. Mutual consent requirement of State v. Leach

State v. Leach, 113 Wn.2d 735 (1989) Feb. '90 LED:03 (Holds that where two business "partners" both were present and had dominion and control over business premises, officers were required to ask both for consent to search)

State v. Walker, 136 Wn.2d 767 (1998) Jan.'99 LED:03 (Exclusionary rule does not apply to consenting cohabitant where Leach rule violated as to cohabitant not asked for consent)

State v. Hoggatt, 108 Wn. App. 257 (Div. II, 2001) Nov. '01 LED:08 (Leach rule does not apply where officers merely request consent to enter living room, as opposed to requesting consent to search)

State v. Morse, __ Wn.2d __, 123 P.3d 832 (2005) Feb. '06 LED:02 (Leach rule was violated where leaseholder of apartment was in a bedroom and officers obtained consent to search the apartment only from a houseguest who answered their knock on the apartment entry door)

b. Exception to *Leach* rule for MV's (*Cantrell*)

State v. Cantrell, 124 Wn.2d 183 (1994) Sept. '94 LED:05 (Leach mutual consent rule applies only to fixed premises and does not apply to motor vehicle searches; suggestion/warning: if one co-occupant objects to search, don't rely on consent of other co-occupant, whether the search is of a MV or of another type of protected area or premises)

c. Family relationships (parent-child)

State v. Summers, 52 Wn. App. 767 (Div. I, 1988) Feb. '89 LED:07 (Parent or guardian generally can consent to search of juvenile's room; but beware of the child who pays rent or is no longer dependent)

d. Real property relationships (landlord-tenant, host-guest, co-tenant)

State v. Birdsong, 66 Wn. App. 534 (Div. I, 1992) Jan. '93 LED:01 (Holds that landlord could not lawfully consent to search of premises not yet abandoned by tenant)

State v. Koepke, 47 Wn. App. 897 (Div. III, 1987) Oct. '87 LED:03 (Host who used guest's room to store items and accessed the room on occasion had authority to consent to search of the guest room)

e. Other relationships (bailor-bailee, employer-employee, school administration)

Generally, a person (bailor) who loans a car to another (bailee) assumes the risk that the borrower will consent to a search of the car. LaFave, Search & Seizure, § 8.6(a).

Employer authority to consent to search of employee desks, file cabinets, and lockers depends on regulations, policies and practices of employer in relation to those areas. LaFave, Search & Seizure, § 8.6(d).

K-12 school authorities may search, consent to search, under relaxed constitutional standards. See, for example, State v. Brooks, 43 Wn. App. 560 (Div. I, 1986) Aug. '86 LED:11 (Search of student's locker by school administrator lawful based on reasonable suspicion that the locker contained illegal drugs)

3. ***"Apparent authority" of 3rd party as arguable theory***

Illinois v. Rodriguez, 497 U.S. 177 (1990) Aug. '90 LED:08 (U.S. Supreme Court holds under Fourth Amendment that "apparent authority" of 3rd party allows police to act on that person's consent to search - - But see next entry re the Washington Supreme Court's Morse decision, rejecting this Fourth Amendment "apparent authority" doctrine on independent state constitutional grounds)

State v. Morse, ___ Wn.2d ___, 123 P.3d 832 (2005) Feb. '06 LED:02 (In case where leaseholder of apartment was in a bedroom and officers obtained consent to search the apartment only from a houseguest who answered their knock on the apartment entry door, the Washington Supreme Court holds that the Washington constitution, article 1, section 7, does not recognize the "apparent authority" doctrine followed under the federal constitution's Fourth Amendment).

G. Warrantless Search Based On Exigent Circumstances

1. *There must be an articulable basis – e.g., need to protect property or persons under "community caretaking function."*

Domestic violence calls often present emergency or exigent circumstances.

State v. Lynd, 54 Wn. App. 18 (Div. I, 1989) Nov. '89 LED:07 (Looking for DV victim following hang-up call – man with cut on face admits to hitting spouse, but says that she is no longer home – officers may go in to look for her)

State v. Raines, 55 Wn. App. 459 (Div. I, 1989) Jan. '90 LED:10 (Looking for DV suspect – officer responding to DV report from neighbor, know of history of DV, officer's see man looking out window as they arrive, woman answers door and says "no problem" and no one there but her and son – officers may go in to look for suspect)

State v. Menz, 75 Wn. App. 351 (Div. II, 1994) Feb. '95 LED:17 (Anonymous caller reports sounds of DV; when police arrive, door open on a cold winter night, TV on, and no response to knock and announce -- officers may go in to check on status of occupants)

However, DV law's 4-hour arrest mandate is not by itself an exigent circumstance; there must be some other reason for forced entry.

2. *Other arguable exigencies reviewed on totality of circumstances*

State v. Swenson, 59 Wn. App. 586 (Div. I, 1990) Feb. '91 LED:16 (Open door on a warm summer night, lack of response to police doesn't justify entry of home).

State v. Downey, 53 Wn. App. 543 (Div. I, 1989) June '89 LED:12 (Strong ether smell justified entry of apparently unoccupied house)

Mincey v. Arizona, 437 U.S. 385 (1978) [NO LED] (No "death scene" search exception; get a warrant once exigencies cease to exist)

State v. Angelos, 86 Wn. App. 253 (Div. I, 1997) Sept. '97 LED:12 (Mom OD'd on drugs; police search home for drugs to protect children)

H. Searches By Private Citizens, School Authorities

Private citizens are not subject to restriction, but there is a special rule for searches by school authorities not acting as agents of police: individualized reasonable belief standard -- see RCW 28A.600.210-240)

I. Impound - Inventory of Motor Vehicles

Washington constitution more restrictive than federal constitution

State v. White, 135 Wn.2d 761 (1998) Sept. '98 LED:08 (Inventory scope cannot extend to locked trunk absent a "manifest necessity" even if there is a trunk release button in passenger area of vehicle)

State v. Dugas, 109 Wn. App. 592 (Div. I, 2001) March '02 LED:02 (Inventory search authority does not permit inspection of contents of closed containers absent "manifest necessity" to do so)

All Around Underground, Inc. v. WSP, 148 Wn.2d 145 (2002) Feb. '03 LED:02 (Impound ordinances or WAC rules adopted

under authority of RCW 46.55.113 provisions relating to vehicles that are driven by suspended or revoked drivers must allow officers to consider reasonable alternatives to impoundment)

J. Securing Room Or House On PC While Search Warrant Is Sought

Illinois v. McArthur, 531 U.S. 326 (2001) April '01 LED:02 (Officers who develop probable cause to search residence while there for an unrelated purpose may secure the premises from the outside and expeditiously seek a search warrant) (U.S. Supreme Court)

State v. Solberg, 66 Wn. App. 66 (1992) Nov. '92 LED:10 (House may be secured from the outside on probable cause while warrant is sought, but search must await warrant)

K. Securing Personal Property on Reasonable Suspicion or PC

Officers with reasonable suspicion to search vehicles or other personal property may take such items from persons in possession and secure such items briefly (under time limits similar to those under Terry v. Ohio) to diligently investigate. Officers with probable cause to search such items may take such items from persons in possession and secure the items for a longer period, but still only for a period that is objectively reasonable in duration, while the officers expeditiously seek a search warrant. See LaFave, Search and Seizure, 3rd Ed., Sec. 9.8(e)

L. No "Carroll Doctrine" In Washington

State v. Ringer, 100 Wn.2d 686 (1983) Feb. '84 LED: 01 (Mobility of MV alone is not "exigent circumstance" justifying a warrantless search.)

M. No "Forfeitable Property" Exception to Search Warrant Requirement

State v. Hendrickson, 129 Wn.2d 61 (1996) July '96 LED: 11 (Mere fact that MV lawfully seized for forfeiture under drug laws does not authorize full search without a warrant.

III. INTERROGATIONS LAW

A. Exposure To Civil Liability Under Fifth Amendment?

1. ***General Rule Is That Miranda Violation Does Not Provide Basis For Civil Rights Suit***

The Ninth Circuit of the U.S. Court of Appeals had held that there is an exception to the rule against Fifth Amendment civil liability for Miranda violations where police engage in premeditated extended Miranda-violative interrogation or ignore repeated requests for counsel: see Cooper v. Dupnik, 963 F.2d 1220 (9th Cir. 1992) Nov. '92 LED:02; Calif. Attys v. Butts, 195 F.3d 1039 (9th Cir. 1999) Jan. '00 LED:03. However, the U.S. Supreme Court overruled those Ninth Circuit decisions in Chavez v. Martinez, 123 S.Ct. 1994 (2003) Sept. '03 LED:02, but remanded the case for a determination of whether the officer's conduct was so "shocking to the conscience" as to constitute a Fourteenth Amendment substantive due process violation. The Ninth Circuit remanded the case for trial on this issue. 354 F.3d 1168. The U.S. Supreme Court denied further review. 124 S.Ct. 2932 (Jan. 20. 2004).

2. ***Interrogation Technique Generally Won't Support Civil Action***

Keates v. Vancouver, 73 Wn. App. 257 (Div. II, 1995) Nov. '95 LED:18 ("Good guy-bad guy" effort not basis for suit in "outrage," "negligent infliction of emotional distress")

B. **Miranda warnings requirement triggered by (1) custody which is the functional equivalent of arrest plus (2) interrogation.**

Stansbury v. Calif., 511 U.S. 318 (1994) July '94 LED:02; *but see* State v. D.R., 84 Wn. App. 832 (Div. I, 1997) May '97 LED:10 (Warnings were required prior to officer's questioning of 14-year-old who had been called to the principal's office at school); see also State v. Heritage, 152 Wn.2d 210 (2004) Sept. '04 LED:12 (questioning by Spokane City Parks security guards was not "custodial"); State v. Lorenz, 152 Wn.2d 22 (2004) Sept. '04 LED:10 (questioning of suspect on her porch after she was told she did not have to answer questions and was free to leave was not "custodial" and the fact that the officers had PC to arrest her and had focused on her as a suspect was irrelevant); **State v. France, 129 Wn. App. 907 (Div. II, 2005) Dec. '05 LED:17 (where officer told Terry DV detainee that the officer would let him go once matters were "cleared up," the suspect was in the functional equivalent of custodial arrest).**

C. **"Initiation of contact" rule bars police initiation of contact with subject of custodial interrogation request who requests counsel and**

then remains in continuous custody. 5th Amendment and 6th Amendment restrictions must be considered where interrogation is on a charged crime. “Initiation of contact” article available on **CJTC LED WEBPAGE**.

D. CrR 3.1 and CrRLJ 3.1 require that police advise an arrestee of the right to counsel after making an arrest.

State v. Trevino, 127 Wn.2d 735 (1995) Jan. '96 LED:03 (Officer should have advised DUI arrestee of CrR 3.1 right to counsel at time of arrest, but there was no prejudice in the violation, so BAC test not suppressed)

State v. Templeton, 148 Wn.2d 193 (2002) Feb. '03 LED:03 (Because BAC testing is not “questioning,” wording of warnings prior to BAC testing must advise of right “at this time,” not merely that right exists “before or during questioning,” so that DUI arrestee is informed of right to consult an attorney before arrestee decides whether to take BAC test – however, the erroneous warnings did not create prejudice in the consolidated cases on appeal, so suppression is not required)

State v. Copeland, 130 Wn.2d 244 (1996) Jan. '97 LED:03 (Officer should have advised murder suspect of CrR 3.1 counsel right before forcibly transporting him to jail facility, but there was no prejudice in the violation, because only physical evidence was taken and that evidence was seized under a search warrant previously obtained)

E. CrR 3.1 requires that reasonable effort be made to promptly attempt to accommodate request for consult with counsel.

State v. Kirkpatrick, 89 Wn. App. 407 (Div. II, 1997) March '98 LED:12 (Where arrestee terminated interrogation with request for an attorney during custodial interrogation, out-of-town detective should have attempted to place defendant in telephonic contact with counsel at stationhouse in Clallam County, rather than simply terminating questioning and making the transport back to Lewis County)

State v. Jaquez, 105 Wn. App. 699 (Div. II, 2001) Aug. '01 LED:18 (Where suspect in robbery was arrested based on outstanding warrant, and the suspect immediately requested an attorney following Miranda warnings, it was a violation of his rights under CrR 3.1 for the officers to subject him to a “showup” ID procedure)

before trying to accommodate his request for consultation with an attorney)

IV. RIGHTS OF FOREIGN NATIONALS

See May '99 LED article at 18-21 discussing rights of foreign nationals under Vienna Convention on Consular Relations. Special warnings should be given following “arrest” (but not where there is only a Terry seizure or traffic stop) of foreign national. Federal Department of State WEBPAGE link can be found on CJTC LED WEBPAGE. In U.S. v. Lombera-Camorlinga, 206 F.3d 882 (9th Cir. 2000) May '00 LED:12, Ninth Circuit ruled that a violation, while it may be enforceable in some other way, does not trigger exclusion. Two divisions of the Washington Court of Appeals have ruled the same: see State v. Martinez-Lazo, 100 Wn. App. 869 (Div. III, 2000) Aug. '00 LED:13; State v. Jamison, State v. Acosta, 105 Wn. App. 572 (Div. I, 2001) Aug. '01 LED: 18. **A 3-judge panel in the Federal Seventh Circuit Court of Appeals, and a U.S. district court judge in another case have held that civil liability under the federal Civil Rights Act can result from a law enforcement agency’s failure to adhere to this treaty. See Jogi v. Voges, 425 F.3d 367 (7th Cir. 2005) Nov. '05 LED:02; Standt v. City of New York, 153 F.Supp.2d 417 (S.D.N.Y. 2001) Dec. '01 LED:20. Only time will tell whether alien arrestees may sue for violation of the treaty.** The United States Supreme Court, recently granted certiorari in Medellin v. Dretke, 125 S.Ct. 686 (2004) Aug. '05 LED:05 in a criminal case to determine, in part, whether any privately enforceable rights are created under the Vienna Convention, but the Supreme Court then dismissed review on procedural grounds. On November 7, 2005, the U.S. Supreme Court granted review in two criminal cases raising suppression issues under the treaty (including the Oregon Supreme Court decision in State v. Sanchez-Llamas, 108 P.3d 573 (2005)). The lower court cases held that the treaty does not create individually enforceable rights, and therefore rejecting a defendant’s argument that his confession to police should be suppressed for violation of the treaty.

V. INTERCEPTING AND RECORDING PRIVATE COMMUNICATIONS

A. Unlawful arrest of citizen who tape records officer on street

RCW 9.73, the “Privacy Act” governing the interception and recording of private conversations and communications, does not define “privacy” for purposes of the Act’s general prohibition on single-party-consent taping of conversations. However, several decisions have held that that a citizen does not violate the statute if the citizen tapes the officer’s spoken words or radio communications where the contact occurs in a public place. State

v. Flora, 68 Wn. App. 802 (Div. I, 1992) July '93 LED:17; Alford v. Haner, 333 F.3d 972 (9th Cir. 2003) Sept. '03 LED:06 (civil rights lawsuit for unlawful arrest); Johnson v. City of Sequim, 382 F.3d 944 (9th Cir. 2004) Oct. '04 LED:22; Dec. '04 LED:14 (civil rights lawsuit for unlawful arrest).

B. Officer tape-recording street contact

Lewis v. DOL, 125 Wn. App. 666 (Div. I, 2005) April '05 LED:09 (Court of Appeals holds that conversation was not private under chapter 9.73 RCW)

C. Using speakerphone function or extension phone to eavesdrop

State v. Christensen, 153 Wn.2d 186 (2004) Feb. '05 LED:09 (The Washington Supreme Court holds that It violates RCW 9.73 to secretly use a speakerphone function, without court authorization, to eavesdrop on a private phone conversation; the Court distinguishes the “tipped phone” case of State v. Corliss, 123 Wn.2d 656 (1994) June '94 LED:02, where the Court found no violation of chapter 9.73 RCW when an officer, without court authorization, listened in a phone conversation by having a consenting participant tip the phone receiver so that the officer could hear the conversation too.)